

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KIOWA TRIBE OF OKLAHOMA, Petitioner v.
MANUFACTURING TECHNOLOGIES, INC.
CASE NO: 96-1037
PLACE: Washington, D.C.
DATE: Monday, January 12, 1998
PAGES: 1-47

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

JAN 20 1998

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'98 JAN 20 A11 :34

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 KIOWA TRIBE OF OKLAHOMA, :

4 Petitioner :

5 v. : No. 96-1037

6 MANUFACTURING TECHNOLOGIES, :

7 INC. :

8 - - - - -X

9 Washington, D.C.

10 Monday, January 12, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:00 p.m.

14 APPEARANCES:

15 R. BROWN WALLACE, ESQ., Oklahoma City, Oklahoma; on behalf
16 of the Petitioner.

17 EDWARD C. DUMONT, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 JOHN E. PATTERSON, JR., ESQ., Oklahoma City, Oklahoma; on
22 behalf of the Respondent.

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
R. BROWN WALLACE, ESQ.	
On behalf of the Petitioner	3
EDWARD C. DUMONT, ESQ.	
On behalf of the United States, as amicus curiae,	
supporting the Petitioner	13
ORAL ARGUMENT OF	
JOHN E. PATTERSON, JR., ESQ.	
On behalf of the Respondent	28
REBUTTAL ARGUMENT OF	
R. BROWN WALLACE, ESQ.	
On behalf of the Petitioner	46

1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1037, the Kiowa Tribe of Oklahoma v.
5 Manufacturing Technologies, Inc.

6 Mr. Wallace.

7 ORAL ARGUMENT OF R. BROWN WALLACE

8 ON BEHALF OF THE PETITIONER

9 MR. WALLACE: Mr. Chief Justice, and may it
10 please the Court:

11 Oklahoma State courts have entered a money
12 judgment against the Kiowa Tribe of Oklahoma. They have
13 entered that judgment notwithstanding the fact that
14 neither the tribe nor Congress have weighed the tribe's
15 inherent immunity to suit, and despite the fact that in
16 the very note sued upon, the parties agreed that nothing
17 in that note would subject or limit the sovereign rights
18 of the Kiowa Tribe.

19 This is one of a series of judgments that has
20 been entered against the Kiowa Tribe that arises out of
21 the same transaction, same series of transactions. The
22 enforcement of these judgments has resulted in a seizure
23 of the tribal tax revenues, an enjoining of the tribe from
24 enforcing tribal law on tribal land, a garnishment of the
25 tribal bank accounts, even accounts containing federally

1 appropriated funds, and generally a draining of the tribal
2 treasury to the point of crippling the tribe's ability to
3 maintain its governmental functions.

4 QUESTION: Well, are those issues that you
5 mentioned just now, are they necessarily involved in this
6 case?

7 MR. WALLACE: They are involved in the case, in
8 this case to the extent that they show the true impact of
9 the judgment and some of the policy reasons why Congress
10 has not elected to waive the sovereign immunity of tribes.

11 QUESTION: It is quite possible, it seems to me,
12 that a State court might have jurisdiction to enter a
13 judgment but perhaps not have the jurisdiction to do some
14 of the things which you describe as having happened in
15 this case.

16 MR. WALLACE: I think you would have to look
17 more deeply at what kind of judgment, and whether or not
18 there was in fact a waiver.

19 Now, if we assume that there was no waiver, I
20 would take the position that the judgment could be at best
21 declaratory, and relating to the application of tribal --
22 the application of State, regulatory, or taxation laws to
23 the tribe when it's operating certainly without tribal
24 country, and in some cases I think the State taxation laws
25 should be respected by the tribe within Indian country.

1 QUESTION: Well, suppose there had been a
2 waiver, would you think that these actions could then have
3 been undertaken? I mean, when the Federal Government
4 waives its sovereign immunity I don't think that means
5 that whoever gets the judgment can move in and cart off
6 money from the Federal Treasury.

7 MR. WALLACE: Well, that's true, Your Honor, and
8 it depends very much on how the waiver is structured.
9 Typically, when tribes engage in the activity of waiving
10 their immunity they not only select a court that they're
11 going to go into, designate the kind of causes of action
12 that they will be subject to, but they also regulate the
13 extent to which they expose their assets to court process.

14 QUESTION: But suppose they didn't. I mean, I
15 would be just as concerned about the effects that you're
16 concerned about here in that situation where there was a
17 waiver, without saying anything about what you can do to
18 the tribe to enforce the liability.

19 MR. WALLACE: Well, in representing a tribe in
20 that situation I would certainly take the position that
21 until there is a waiver with respect to what assets can be
22 subjected to the judgment, then the waiver is incomplete,
23 that in order to have a complete and effective waiver so
24 that a judgment can be entered and can be enforced, the
25 waiver has got to have the court agreeing that it --

1 excuse me, have the tribe agreeing that it will be subject
2 to court process, and then the enforcement must also be
3 specifically covered.

4 QUESTION: So that if the tribe said, the tribe
5 hereby waives sovereign immunity for liability on this
6 note, that would be insufficient to waive immunity if a
7 court ordered execution or attachment of a tribal bank
8 account.

9 MR. WALLACE: I think it's in -- yes. I think
10 it's insufficient because it fails to designate the
11 property, the sovereign property to which the waiver
12 attaches. The -- you know, the immunity of a sovereign
13 has two basic concepts. Number 1, the agreement of the
14 sovereign to subject itself to court jurisdiction, in
15 essence the agreement to create jurisdiction in a court,
16 and then the second concept is the enforcement, the
17 designation of exactly what remedial devices that the
18 sovereign will be subject to.

19 QUESTION: I just don't know if it's the
20 tradition in our law to parse and separate sovereign
21 immunity into those two components or not.

22 MR. WALLACE: State statutes that deal with
23 State sovereign immunity very regularly say the State will
24 agree to be sued for these causes of action, and then very
25 regularly address the means of enforcement of those causes

1 of action -- or, excuse me, of any judgments under those
2 causes of action.

3 QUESTION: Usually by appropriation by the State
4 legislature, or something.

5 MR. WALLACE: That is one of the devices that's
6 used. Oklahoma in fact does use that device. I'm
7 familiar with that.

8 QUESTION: That is certainly not the case, I am
9 sure, with regard to foreign sovereign immunity under the
10 Foreign Sovereign Immunities Act, where a foreign
11 sovereign is liable for its commercial activities --

12 MR. WALLACE: Foreign sovereign --

13 QUESTION: -- and I'm quite sure that even when
14 there's been no waiver what you can do is, if the foreign
15 sovereign has a bank account in this country, you can move
16 against the bank account, period.

17 MR. WALLACE: Yes, sir. The Foreign Sovereign
18 Immunities Act proceeds on a slightly different theory
19 with respect to the handling of sovereign immunity.
20 That's a situation where you have the foreign sovereign
21 dealing with the immunity of another sovereign.

22 In the Foreign Sovereign Immunities Act, the
23 legislature has chosen to respect the assets of the
24 foreign sovereign by design -- or by limiting some of the
25 assets that are subject to attachment. It -- you know, it

1 attempts to leave its truly governmental assets, you know,
2 free from --

3 QUESTION: I must confess, I'm a little puzzled
4 by --

5 MR. WALLACE: Excuse me?

6 QUESTION: -- the discussion. There's no waiver
7 in this case, is there? Why are we talking about waiver?
8 The question is whether there's anything that needs to be
9 waived. Isn't that the issue?

10 MR. WALLACE: Well, that's true. This case does
11 not have a waiver or any language in it that even purports
12 to be a waiver. This is a situation where the State of
13 Oklahoma has concluded that its courts have inherent
14 jurisdiction over an Indian tribe, and it does not need
15 the federally required consent to suit or waiver of
16 immunity in order to create jurisdiction in Oklahoma
17 courts.

18 The reason why it's concluded that is, Oklahoma
19 has said that when the Kiowa Tribe engaged in commerce off
20 of Kiowa country, then it did away with the Federal
21 requirement that jurisdiction be created by consent or
22 waiver.

23 QUESTION: Now, that's the question we have
24 here, is it not?

25 MR. WALLACE: That's -- yes, sir.

1 QUESTION: Yes, that's the question --

2 MR. WALLACE: Yes, Your Honor.

3 QUESTION: -- you presented in your petition.

4 MR. WALLACE: Yes, Your Honor. That is the
5 question.

6 QUESTION: In so holding was the Oklahoma court
7 in effect accepting the invitation -- maybe that's too
8 strong a word, at least the suggestion in the, what was
9 it, the Cabazon case that in fact that might be the case.
10 Didn't this Court suggest that that might be possible?

11 MR. WALLACE: I can remember a point in a
12 concurring opinion in Citizen Band Potawatomi where there
13 were -- where there was a question raised with respect to
14 whether the immunity of a tribe would apply to commercial
15 activities off of Indian country, yes, sir, Your Honor.

16 QUESTION: All right. Now, why was the
17 suggestion ill-taken? Why was the Oklahoma court wrong?

18 MR. WALLACE: The Congress is vested with
19 exclusive control over tribal sovereignty and tribal
20 immunity as a part of tribal sovereignty. Congress has
21 never drawn that line in tribal immunity. In fact, when
22 Congress approaches the issue of tribal immunity, it
23 consistently expresses its approval of the doctrine.

24 QUESTION: Well, in our Mescalero opinion we
25 said that activities conducted by the Mescalero Band off

1 the reservation were subject to nondiscriminatory State
2 taxes, didn't we?

3 MR. WALLACE: Absent -- yes, absent Federal law
4 to the contrary, the Court held that the activities were
5 subject to nondiscriminatory State taxes.

6 QUESTION: So to say, absent Federal law to the
7 contrary, these activities are subject to State authority
8 suggests that the Congress would have to affirmatively
9 prohibit the jurisdiction, rather than affirmatively
10 authorize it, the way you're talking.

11 MR. WALLACE: I think the problem with the line
12 of reasoning there is a couplefold. Number one, Mescalero
13 did not involve immunity to suit. Mescalero was talking
14 about immunity with respect to taxation. This Court has
15 characteristically treated the tribes' immunity with
16 respect to taxation and regulation very differently than
17 it has the treated tribes' immunity to suit.

18 As an example, I take you to the Citizen Band
19 case, where the issue was whether or not Oklahoma could
20 require a tribe to collect Oklahoma's cigarette taxes for
21 on-reservation sales to nonmembers.

22 You said, yes, it could, but when Oklahoma then
23 asked for a judgment against the tribe, a money judgment
24 against the tribe for taxes that hadn't been collected,
25 the Court went directly to the issue, or directly to the

1 point of tribal immunity to suit, and pointed out that
2 Congress has long approved it, Congress uses it as a part
3 of its overall policy with respect to Indian tribes, and
4 the Court was not, under those circumstances, disposed to
5 modify its longstanding approval of tribal immunity.

6 QUESTION: But Mr. Wallace, it has to come from
7 some place originally. It wasn't Congress that invented
8 the doctrine of sovereign immunity. It is a doctrine that
9 the Court has applied and interpreted, so the Court must
10 make a determination whether the immunity you claim exists
11 or not. It can't just say, well, we'll leave it to
12 Congress.

13 MR. WALLACE: Yes, and the Court has found in
14 the past that the immunity exists as an aspect, an
15 inherent aspect of a sovereign that preexists the
16 Constitution. The Court has recog --

17 QUESTION: But then you're distinguishing the
18 tribes as sovereign from a sister State as sovereign, from
19 a foreign nation as sovereign.

20 MR. WALLACE: Yes, Your Honor, and I think the
21 distinction is probably valid. Tribes have a unique
22 relationship with the Federal Government. The Federal
23 Government has adopted a trust responsibility toward
24 tribes. It makes them extremely different, very different
25 from either sister States or foreign nations.

1 QUESTION: What is -- if the -- suppose the
2 tribe goes downtown Tulsa and they buy a piece of property
3 and open an office, and the taxes are \$4,000 a year, and
4 they don't pay, right. Can the city or the State sue the
5 tribe and get the taxes?

6 MR. WALLACE: For taxes?

7 QUESTION: Yes.

8 MR. WALLACE: Well, I -- if the acquisition is
9 done appropriately --

10 QUESTION: Yes -- they buy it.

11 MR. WALLACE: The ad valorem taxes do not apply
12 to the --

13 QUESTION: All right, fine. What is the theory
14 under which Oklahoma can get the taxes for the property
15 but cannot get the rent?

16 MR. WALLACE: Well, Oklahoma has to figure out
17 collection and remedial devices short of going to the
18 court and filing a lawsuit.

19 QUESTION: So you think Oklahoma cannot collect
20 the taxes, either. I mean, what I'm trying to do is, I
21 want to understand the theory of sovereign immunity under
22 which -- or, what is the case? There are a lot of
23 possibilities.

24 Maybe they have oil bubbling up underneath in
25 the basement, violating environmental laws. Can you get

1 an injunction? What about a fine? What about taxes, and
2 what about the rent? What's the theory of the sovereign
3 immunity for the Indian tribe that says which of those
4 they can get, which they can't, and why?

5 MR. WALLACE: Well, in the regulatory and
6 taxation cases this Court has approached the issue on an
7 infringement and preemption analysis. You cannot infringe
8 upon tribal self-government, and you cannot -- and States
9 cannot do anything preempted by Congress. That has never
10 been applied, though, to a damage lawsuit against a tribe
11 in State court.

12 I'd like to reserve the remainder of my time for
13 rebuttal.

14 QUESTION: Very well, Mr. Wallace.

15 Mr. DuMont, we'll hear from you.

16 ORAL ARGUMENT OF EDWARD C. DUMONT
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONER

19 MR. DUMONT: Thank you, Mr. Chief Justice, and
20 may it please the Court:

21 I think the problem here is a State court did --
22 entered a judgment which did two things, it held that as a
23 matter of State law the tribe was not immune from suit,
24 and that's wrong for two reasons. First of all, it's not
25 a question of State law, it's a question of Federal law,

1 and second, Federal law, Federal substantive law preserves
2 the tribe's immunity from suit, and let me just address
3 those for moment.

4 The -- I think it should be common ground that
5 this is a matter of Federal law, supervening Federal law,
6 so if we move to the substance of the Federal law, the
7 rule derives from -- as my colleague said, it originally
8 derives from the preconstitutional sovereign status of the
9 tribes, and this Court has made that clear repeatedly.

10 Now, it is also supported in the modern context
11 by at least three very firm foundations. First, the
12 powerful general background principle of what sovereign
13 immunity from suit means, second, the history of the
14 Federal Government's relationship with the tribes,
15 Government to Government, and this Court's precedents, and
16 third, the critical practical importance of immunity from
17 suit from money judgments to the tribes in modern-day
18 America.

19 QUESTION: Well, let's talk about the practical
20 importance a minute. With increasing commercial activity
21 between tribes and nontribal members off the reservation
22 there may be, indeed, a need for some waiver of sovereign
23 immunity to make it possible for tribes to have -- enter
24 into business dealings with people off the reservation.
25 Is Congress considering legislation about this right now,

1 do you know, Mr. DuMont?

2 MR. DUMONT: They are actively considering it.
3 Hearings, extensive hearings were held in 1996. There was
4 a bill which passed the Senate which would have waived
5 immunity in certain circumstances in '97. That provision
6 was removed on the premise, publicly stated, that hearings
7 would be held by April 30th of 1998, and those hearings
8 have been tentatively scheduled by the Committee on Indian
9 Affairs of the Senate.

10 QUESTION: But Congress is debating the
11 desirability, or lack thereof, of certain waivers of
12 sovereign immunity.

13 MR. DUMONT: That's absolutely correct, and
14 Congress as long ago as 1934 in the Indian Reorganization
15 Act recognized exactly this issue that you bring up about,
16 and that the Oklahoma courts adverted to as a matter of
17 policy, which is, will anyone deal with the tribes, and
18 they provided in the Oklahoma Welfare -- Indian Welfare
19 Act, for one thing, for not only the incorporation of
20 tribal governments as governments, but also separate
21 incorporation as business entities, and those entities are
22 or may be subject to suit in certain circumstances,
23 limited to their business property, just like a normal
24 corporation would be.

25 So Congress has thought about this and has

1 addressed it in the past, and they're preparing to think
2 about it again. They really --

3 QUESTION: Have they ever passed a statute
4 saying the tribes have immunity?

5 MR. DUMONT: There are a number of statutes, I
6 think the most recent one being the Indian Tribal Native
7 American Agricultural Reform Act of 1993, which recognized
8 that implicitly by saying that nothing that Congress is
9 doing --

10 QUESTION: I understand all the implicit record.
11 Is there any statute in which Congress has expressly said
12 tribes shall have immunity?

13 MR. DUMONT: I'm not aware of any statute that
14 says that in those terms. I would say -- I could say,
15 though, that to pass a statute saying the tribe's immunity
16 will be waived in the following circumstances, or under
17 the following very special circumstances, is to say that
18 we assume the background principle is immunity.

19 QUESTION: Well, of course they can assume that,
20 because we have cases that have said that, but let me ask
21 this. If the Foreign Sovereign Immunities Act had not
22 been passed, do you think that this Court could by
23 judicial decision have adopted as part of our domestic law
24 of foreign sovereign immunity the commercial acts
25 exception, which have become almost uniform in

1 international law?

2 Do you think we would have had to wait for
3 Congress to pass the Foreign Sovereign Immunities Act
4 before we could revise our jurisprudence on sovereign
5 immunity to comport with the new international
6 understanding?

7 MR. DUMONT: Yes, and I would say that
8 because --

9 QUESTION: Yes.

10 MR. DUMONT: Yes.

11 QUESTION: We would have had to wait for
12 Congress?

13 MR. DUMONT: You would have had to wait for
14 Congress, and I would say that because the original common
15 law, if you will, recognition of the foreign -- of the
16 scope of a foreign sovereign's immunity came so early in
17 this Court's history and this country's history in the
18 Schooner Exchange case that by the time you got to the
19 1950's, when the State Department was recognizing the
20 commercial exception, it was already firmly settled in
21 this Court's jurisprudence.

22 The Berizzi Brothers case in 1926, for instance,
23 made clear that extended to commercial property of a
24 sovereign.

25 QUESTION: So it never changes? I mean, what if

1 circumstances dramatically change?

2 MR. DUMONT: If circumstances dramatically
3 change, then it is always the prerogative of the sovereign
4 to make its own decisions about what cases its courts will
5 entertain, and that's true from the Schooner Exchange on,
6 but the question here would be who would represent the
7 sovereign of the United States, and this Court had made
8 clear consistently that the default rule was going to be
9 absolute immunity, and it was then up to Congress to vary
10 that.

11 QUESTION: Then what was going on with the Tate
12 letter? Before the Foreign Sovereign Immunities Act,
13 courts were recognizing that there were occasions where
14 the sovereign was not immune, and Congress had passed no
15 legislation.

16 MR. DUMONT: I think what the courts had
17 recognized was that in cases where the State Department
18 was willing to represent to the Court that it was
19 important -- that it was not important that immunity
20 should not be recognized, then the courts would frequently
21 accept that as consistent with --

22 QUESTION: But the State Department is not
23 Congress.

24 MR. DUMONT: No, but the State Department is a
25 political branch of the Government, and I think our

1 submission is merely that the Court's policy -- whether
2 the Court had the power to do it or not, it may very well
3 have had the power to see a development in common law, but
4 the Court did not do that.

5 The Court said, look, we have always -- and
6 Berizzi Brothers is the prime case on this. The Court
7 said we have always applied a rule of absolute immunity.
8 We see no reason to make an exception for commercial
9 property just because it's owned by a sovereign. That's
10 going to be our rule.

11 Now, of course, in situations where the
12 political branches which are responsible under the
13 Constitution for foreign affairs tell us to do something
14 different, then we will do something different, but the
15 default rule is going to be immunity, and I think that's
16 really very close to what we're saying here.

17 Now, Indian tribal sovereigns are different from
18 foreign sovereigns --

19 QUESTION: In particular, what is the default
20 rule? Is it the case that if they rent a building in
21 downtown Tulsa, they don't -- there's no way to collect
22 taxes?

23 MR. DUMONT: Against a foreign sovereign, or
24 against a tribal --

25 QUESTION: No, say the Indian tribe in your

1 view.

2 MR. DUMONT: Well, there are -- as the Court had
3 recognized in Potawatomi, there may be ways, some of them
4 more effective, some of them less effective. There might
5 be a suit against a tribal officer, for instance --

6 QUESTION: In other words, the answer is they
7 cannot sue to get the money from the tribe.

8 MR. DUMONT: They cannot sue the tribe, and the
9 tribe --

10 QUESTION: Can they sue to get the -- can they
11 sue to enforce the environmental regulation? That is to
12 say, can they bring an injunction against the tribe so
13 that the oil isn't bubbling up from the basement?

14 MR. DUMONT: Well, under -- if there's a
15 specific Federal statute, which in RCRA I believe there
16 is, there's a specific waiver by Congress of the --

17 QUESTION: Well, all these -- there's a State
18 law that says you can't keep owls in the basement, or you
19 can't keep -- you can't have holes for the coyotes,
20 whatever.

21 I mean, there can be a million different State
22 laws, and they want to bring -- a State environmental law
23 is violated and they want to bring an injunction to
24 prevent it. Can the State do that, enjoin the tribe to
25 keep the building according to whatever the State law is,

1 a reasonable State law?

2 MR. DUMONT: Under State -- a State may not
3 proceed under State law to get an injunction directly
4 against the tribe.

5 Now, in the situations you --

6 QUESTION: Even though it's in downtown -- so in
7 fact, an officer of the tribe is driving a tribe truck,
8 and he speeds. Can they stop him? I mean, he's driving
9 a -- it's a tribal business in downtown --

10 MR. DUMONT: Yes. Yes, of course you can stop
11 the officer, because then you're stopping -- you're
12 exercising jurisdiction over the individual, not over the
13 tribe, but can you seize the truck? I mean, probably not,
14 because then you are talking about the property of the
15 tribe, and that's the distinction. It's a crucial
16 distinction between the tribe, quae tribe --

17 QUESTION: Where does your position leave what
18 we said in Mescalero? I mean, in theory the State can
19 collect taxes, but it can't in -- it has no practical way
20 of doing it?

21 MR. DUMONT: I think it leaves the tribe -- it
22 leaves the States in exactly the place they were left in
23 Potawatomi, which is they have a variety of mechanisms to
24 enforce their valid regulations, but those mechanisms do
25 not include a direct judgment, either injunctive or

1 monetary, against the tribe, and that's -- I think that's
2 precisely what the Court said in Potawatomi.

3 QUESTION: But in Mescalero they said the tribe
4 was subject to taxation.

5 MR. DUMONT: It is crucial to distinguish
6 between -- we heard in the first argument about the
7 many -- the hydra-headed concept of jurisdiction. I think
8 it's very critical to distinguish between regulatory
9 jurisdiction, jurisdiction to impose rules which are valid
10 and must be obeyed from enforcement, judicial enforcement
11 jurisdiction, and tribal immunity from suit, like the
12 United States' immunity from suit, or a State's immunity
13 from suit, is about enforcement jurisdiction. It's about
14 amenability to suit in another sovereign's courts.

15 Now --

16 QUESTION: But that is entirely -- but that --
17 as I understand it, your argument rests entirely upon a
18 rule of prudence, self-administered by this Court, that we
19 will not revise or consider revising the traditional rule,
20 and I'm not sure why we should be bound by that rule of
21 prudence.

22 MR. DUMONT: I think it rests on something that
23 is -- the Court has always recognized that the tribes were
24 created as sovereign, they have sovereignty. Now, that
25 is --

1 QUESTION: And we developed this rule at a time
2 when the kinds of problems that are being hypothesized in
3 this argument really would not have been realistic
4 hypotheses. Now they are realistic hypotheses.

5 MR. DUMONT: Well, I think that because the
6 Court has recognized the tribes are sovereigns, and
7 because immunity from suit is such a central part of the
8 inherent background of the rule of sovereignty -- and we
9 see this in cases like Couer d'Alene, we see it in cases
10 under the Eleventh Amendment before the States, we see it
11 in cases involving the United States.

12 Those principles of sovereign immunity aren't
13 written down somewhere. They are simply part, a
14 constitutive part of our law. They are not the kind of
15 common law --

16 QUESTION: Mr. DuMont, those principles have
17 changed, at least with respect to sister States, and with
18 respect to foreign countries, so you are now urging a kind
19 of sovereign immunity that doesn't -- no longer exists
20 State-to-State or foreign nation vis-a-vis the United
21 States.

22 MR. DUMONT: Well, let me make two points about
23 that in reverse order. As to foreign nations, it does not
24 exist in the commercial context because Congress has
25 passed a statute that addresses that, and may I just

1 revert to the prior argument of my colleague by pointing
2 out that in the Foreign Sovereign Immunities Act Congress
3 was able to consider the problem holistically and to
4 address issues like forum. There's automatic removal for
5 a foreign sovereign to Federal court, like enforcement.
6 There are provisions about what property of the sovereign
7 you can attach for a judgment, and issues like damages.
8 There are limitations on the kind of damages that apply.

9 Now, as to States, first of all there's a bit of
10 a canard going around that State sovereignty doesn't exist
11 any more, but that's only as the States have waived it,
12 and in Nevada v. Hall the Court recognized that some of
13 those waivers are very limited, and those apply to the
14 court -- the State's own courts.

15 Now, as to Nevada v. Hall itself, that rests on
16 a premise that the States were independent sovereigns when
17 they went into the compact of the Constitution, and the
18 Court found nothing in the Constitution that purported to
19 give away each State's right to subject another sister
20 State to its own jurisdiction, but what the States did
21 give away was their ability to regulate Indian tribes and
22 their ability to regulate Indian affairs. That became a
23 matter of exclusive Federal jurisdiction. I think that's
24 pellucid under the Court's cases.

25 QUESTION: Do you think that's true with regard

1 to tribal commercial activities off the reservation? Are
2 there no State regulatory powers there?

3 MR. DUMONT: Again, regulatory power has to be
4 distinguished, but I think it is true with respect to
5 jurisdiction, and the tribal immunity from suit, and what
6 that effectively did was to freeze into place a Federal
7 common law rule which, Nevada v. Hall recognized that if
8 you had looked at that rule at the time of the
9 Constitution you would have said that every State would
10 recognize immunity for every other State.

11 QUESTION: But the regulatory jurisdiction is
12 just illusory if there's no way to enforce it.

13 MR. DUMONT: I think that's not correct, for all
14 the reasons that were stated in the opinion in Potawatomi,
15 which is to say that there may be damage actions or
16 injunctive actions against --

17 QUESTION: But how could there be damage actions
18 against the tribe? On your submission, there can't be.

19 MR. DUMONT: I'm sorry, against tribal officers.
20 There may be actions against officers, there's always the
21 potential for agreement with the tribe --

22 QUESTION: Officers have no money. I mean, the
23 tribe has collected all of this tax money and hasn't
24 turned it over to the State, billions of dollars, and
25 they're going to sue some --

1 MR. DUMONT: Well, I --

2 QUESTION: -- tribal officer for millions of
3 dollars?

4 MR. DUMONT: I simply have to suggest that if
5 that were the controlling principle, then the result in
6 Potawatomi would have been otherwise. It would also have
7 been --

8 QUESTION: Is this true in anti-discrimination
9 legislation, too? If the tribe does business they don't
10 have to live up to any of that, insofar as there could be
11 monetary judgments or injunctions to enforce.

12 MR. DUMONT: Well, I think it's very instructive
13 that when Congress applied parts of the Fourteenth
14 Amendment and the Constitution to Indian tribes in the
15 Indian Civil Rights Act the Court has held that it clearly
16 thought about this issue and decided that damage actions
17 were not -- against the tribe were not an appropriate
18 means of resolution, so it specifically withheld
19 jurisdiction to enter -- even under a Federal law to enter
20 money judgments against the tribe, and the same principle
21 applies here, that you have to protect these small
22 governments.

23 The same functional reasons that supported
24 immunity for State governments when they were smaller and
25 more vulnerable than they are now still support that

1 immunity for Indian tribes.

2 QUESTION: Mr. Dumont, there's one justice of
3 this Court that said, if there's jurisdiction to regulate,
4 and specifically jurisdiction to tax, then of course there
5 must be jurisdiction to enforce that tax. That was the
6 International Shoe case.

7 MR. DUMONT: Well, I would suggest that, for
8 instance, there are a variety of Federal laws that clearly
9 impose mandatory Federal law obligations on the States and
10 State officers, and yet they are not -- the State is not
11 amenable to a private suit in Federal -- even in Federal
12 court to enforce those obligations. It's exactly the same
13 distinction.

14 Sometimes you have a right, but you need to go
15 to the sovereign's own forum to enforce it, or you need to
16 go to Congress to try to get something done about it.
17 There are problems that are inherent in sovereign
18 immunity, and that, I think, is recognized in the Three
19 Affiliated Tribes decision. Sometimes you will end up
20 with a result, if you are suing a sovereign, which will
21 perhaps seem unfair. That is -- it is an ineluctable
22 aspect of the tribe's sovereign immunity, and as long as
23 we're going to recognize that immunity, that may be true.

24 Now, if there are valid policy arguments, and I
25 think there may be, for adjusting this situation, then

1 they are the province of Congress, and Congress has been
2 apprised of them and is actively considering them.

3 Thank you.

4 QUESTION: Thank you, Mr. DuMont. Mr.
5 Patterson, we'll hear from you.

6 ORAL ARGUMENT OF JOHN E. PATTERSON, JR.

7 ON BEHALF OF THE RESPONDENT

8 MR. PATTERSON: Mr. Chief Justice, and may it
9 please the Court:

10 The issue in this case is very simple. It's
11 whether the tribe has sovereign immunity for its off-
12 reservation commercial activities. The tribe and the
13 United States urge a -- an immunity for the tribe which is
14 greater than that which is afforded to a State, which is
15 greater than that afforded to a foreign sovereign.

16 QUESTION: Do you concede that the issue is a
17 Federal law issue, not a State law issue?

18 MR. PATTERSON: It is a Federal law issue which
19 can be determined very properly, as this was, in the
20 District Court of Oklahoma County and in the State courts
21 of Oklahoma under Oklahoma Tax Commission v. Graham.

22 QUESTION: But the State applied its own State
23 law in resolving this. Don't we have to look at Federal
24 law?

25 MR. PATTERSON: The State --

1 QUESTION: How can you defend the State court
2 decision by applying State law to answer this question?

3 MR. PATTERSON: The State court looked to
4 Federal common law in part. It looked to Padilla, a New
5 Mexico case, which in turn looked to Nevada v. Hall for
6 the principles of sovereign immunity as between competing
7 sovereigns.

8 QUESTION: Well, I would have thought that for
9 you to argue for affirmance here you would have to at
10 least justify it on the basis of Federal law principles.

11 MR. PATTERSON: And we do very much.

12 QUESTION: But were Federal law principles
13 decided below? In other words, if we were to accept your
14 suggestion that we affirm based on Federal law, wouldn't
15 we be making a judgment about or a decision about Federal
16 law which has not been made by a lower court in this case?
17 In other words, we would not be reviewing, we would be
18 taking up a question in the first instance, wouldn't we?

19 MR. PATTERSON: Yes, except the -- if I
20 understand your question, Justice Souter, the lower court
21 made its decision based on principally Mescalero Apache
22 Tribe v. Jones, and the language which has been referred
23 to, the situation has been referred to which is to the
24 effect --

25 QUESTION: If I understand you -- you correct me

1 if I wrong. If I understand it, the Court was, as it
2 were, informed by that case in making a State law
3 judgment.

4 MR. PATTERSON: The Oklahoma supreme court in
5 Hoover, which is -- was held to be controlling in this
6 case, was based on an examination, and my understanding of
7 Federal law as enunciated by this Court, and in light of
8 Federal statutes.

9 The question is, what is the nature of sovereign
10 immunity, and that's the question that is before you for
11 your decision today. The Congress has not created any
12 immunity for the tribe when it goes off-reservation in
13 tribal activities. This has been adverted to previously.

14 The principles of immunity, if applied as the
15 tribe and the United States are urging, then any of 320
16 approximately federally recognized tribes can go off
17 tribal lands into the 50 United States and engage in any
18 kind of commercial activity with complete immunity from
19 Federal law, with impunity, if you will --

20 QUESTION: It usually takes two to engage in
21 commercial activity, doesn't it? I mean, can a tribe
22 force anybody to enter into commercial arrangements with
23 it?

24 MR. PATTERSON: The tribe can't -- in the
25 commercial contract case you have two parties of

1 supposedly equal statute.

2 QUESTION: Right.

3 MR. PATTERSON: If you have a tribal operation,
4 a business office in Tulsa, Oklahoma, for instance, where
5 there are business invitees in that tribe, they are not
6 people who have available waiver, for instance, of
7 sovereign immunity. If they suffer an injury on the
8 premises, then their only recourse is against the owner-
9 landlord-manager.

10 QUESTION: Well, this is a suit on a promissory
11 note where on its face it said sovereign immunity wasn't
12 waived. I mean, what if somebody's going to enter into a
13 deal with an Indian tribe, and accept a promissory note, I
14 guess you could as a matter of contract law insist that
15 there be a tribal waiver before you'll accept that
16 arrangement and note, and there wasn't here.

17 MR. PATTERSON: If I might, Justice O'Connor,
18 reading from the record at page 14, the language is,
19 nothing in this note subjects or limits the sovereign
20 rights of the Kiowa Tribe of Oklahoma, and we don't have
21 any argument with that language. I'm not sure what it
22 means, but it's based on a premise --

23 QUESTION: Well, it's a little like buyer
24 beware. I mean, if in fact the law is, as this Court
25 seems to have recognized in the past, that the tribe

1 enjoys sovereign immunity from private suits, then someone
2 dealing with the tribe should protect himself in the
3 contractual arrangements that he makes.

4 MR. PATTERSON: Once again, if it's activity
5 which is protected by sovereign immunity that's exactly
6 the case. It's our position that the tribe has no
7 sovereign immunity when it goes off tribal lands --

8 QUESTION: What's the --

9 MR. PATTERSON: -- in a commercial --

10 QUESTION: That is to say, if there's anything
11 to -- maybe there's no sovereign immunity, but if there's
12 any sovereign immunity, wouldn't it at least at its heart
13 be there to protect the treasury in a contract suit from
14 money damages, and if that's so, why does it matter?
15 What's the principle on which it matters whether that
16 commercial activity that led to the effort to get money
17 from the tribal treasury, what's the difference whether it
18 took place on or off?

19 MR. PATTERSON: The cases which amounts to the
20 general rule that the tribe is not subject to suit absent
21 its waiver or a congressional abrogation of immunity arose
22 historically out of cases where the tribe was acting in
23 proper tribal matters on a tribal reservation, on land.

24 QUESTION: Yes, that's true, so that's why I
25 ask. I mean, that happens to be the history, so why -- in

1 terms of the -- of a sovereign immunity principle,
2 wouldn't contractual damages be at its heart, and what
3 could the reason be -- what reason that's related to
4 sovereign immunity could there be for saying that the
5 place of a contract makes a difference?

6 MR. PATTERSON: The place of the contract in
7 this particular case is of critical difference. If the
8 place of the contract and place of performance were to be
9 on tribal lands, then we would have the rules which the
10 Government and the Kiowa tribe argue.

11 When the tribe goes outside tribal lands in a
12 commercial venture, then you have to look to the nature of
13 its sovereignty, and we say that in that instance the
14 tribe has no sovereign immunity from suit.

15 The expression of the inability of money damage,
16 a suit being brought against the tribe, was looked at in
17 Potawatomi, Citizens Band Potawatomi, and there the State
18 was found to have sufficient interest in the activity, the
19 levy of an Oklahoma tax on a nonmember of the tribe in a
20 sale on tribal lands, that the State was allowed to impose
21 certain minimal regulation on the tribe.

22 However, the second aspect of that, could the
23 State exercise the most efficient means of collecting the
24 monies that were owed to it, could it sue the tribe
25 directly, the answer was no.

1 Now then, when you read that, and look at that
2 in light of Mescalero -- and Mescalero Apache was cited in
3 Citizen Band Potawatomi for the proposition that you don't
4 find the same immunity when the tribe goes off of tribal
5 lands.

6 QUESTION: Well then, the rule you're arguing
7 for really is not -- is not a -- analogous to the rule in
8 the Foreign Sovereign Immunities Act at all. I mean, if
9 you have a foreign sovereign that engages in commercial
10 activities, even if the company that it sets up enters its
11 contracts at home, there would still be liability for the
12 commercial activities, wouldn't there?

13 MR. PATTERSON: There --

14 QUESTION: You can't really appeal to the change
15 in sovereign immunity internationally, or the provisions
16 of the Foreign Sovereign Immunities Act as exemplifying
17 what you would want us to do. You want us to create some
18 new kind of exemption from sovereign immunity, one that
19 only applies when you're acting outside your own country.

20 MR. PATTERSON: And we would urge that that is,
21 in fact, the rule. That is the common law rule that when
22 a sovereign goes outside its sovereign territory, outside
23 its jurisdiction, then it is no longer covered by
24 sovereign immunity as a matter of right.

25 The only protection that it receives is under

1 the principles of race and comity, will comity be accorded
2 the visiting sovereign when -- in Nevada v. Hall, one
3 which is not an Indian exemption, Indian sovereign
4 immunity case but it has -- the principles are
5 appropriate.

6 QUESTION: You, do you just so -- I don't mind
7 you saying all of this, but so long as you get around to
8 answering my question. Do you agree that the Foreign
9 Sovereign Immunities Act and the international concept of
10 commercial liability for sovereigns does not work the way
11 the principle you're urging on us would work?

12 MR. PATTERSON: That's not my understanding,
13 Justice Scalia. I believe --

14 QUESTION: You think if France sets up an
15 aircraft company and it's a purely commercial venture,
16 profit-making venture, but all the shares are owned by the
17 State of France, the Nation of France, that if that
18 company makes a contract, so long as it makes the contract
19 in France the commercial activities exception to sovereign
20 immunity does not apply?

21 MR. PATTERSON: No, absolutely not, it does
22 apply.

23 QUESTION: I think so.

24 MR. PATTERSON: I was afraid I was not
25 communicating with you --

1 QUESTION: Mm-hmm.

2 MR. PATTERSON: -- I had misspoken my position.
3 It's Manufacturing Technologies' position that when the
4 tribe goes outside of its reservation boundaries, then
5 it's subject to --

6 QUESTION: Okay.

7 MR. PATTERSON: -- as per Mescalero --

8 QUESTION: But not if conducted the commercial
9 activities on its reservation.

10 MR. PATTERSON: And that is the distinction.

11 QUESTION: And that's different from the
12 international rule, isn't it?

13 MR. PATTERSON: In the international rule, once
14 again, when a sovereign conducts activities on its -- in
15 its own jurisdiction, then it is sovereign.

16 QUESTION: Does this tribe have a reservation?

17 QUESTION: That's wrong.

18 MR. PATTERSON: This tribe has approximately
19 1,200 acres of land --

20 QUESTION: Does it have a reservation?

21 MR. PATTERSON: It does not have a reservation.

22 QUESTION: No. So under your position, whatever
23 it does, wherever it does it, there's no immunity, because
24 there is no reservation here.

25 MR. PATTERSON: That's not our position.

1 When -- the Mescalero case speaks in terms of reservation.
2 Some tribes have very large reservations -- the Navajo.
3 Others have less, less acres of land under their
4 jurisdiction and control than do the Kiowas, but Indian
5 country, reservation, lands held in tribal trust, I
6 believe that to some degree, each of those may be, may
7 support activities which are protected by sovereign
8 immunity.

9 QUESTION: Well, I can understand -- I guess I
10 can understand what you're saying, but I don't understand
11 the justification for it. Let me ask basically the same
12 kind of question that Justice Breyer asked, but in a
13 different way.

14 One way of looking at sovereign immunity is to
15 look at it as a doctrine about the relationship between
16 sovereign A and sovereign B whose courts assert judicial
17 jurisdiction over sovereign A. Why should the policy that
18 says their relationship is such that B's courts should not
19 have jurisdiction over A, why should the doctrine that
20 embodies that relationship depend for its application on
21 whether a contract was made on a piece of trust land, or
22 in downtown Tulsa?

23 MR. PATTERSON: Because the -- historically the
24 immunity which was accorded the Indian sovereign was as to
25 the tribe's acts on tribal lands in relation to its own

1 internal affairs, management of its internal affairs.

2 The --

3 QUESTION: Well, that -- historically that is
4 certainly true with respect -- I guess it's certainly true
5 with respect to legislative or regulatory jurisdiction,
6 but we're now talking about judicial jurisdiction, and I'm
7 not sure that it -- anything follows with respect to
8 judicial jurisdiction.

9 MR. PATTERSON: The -- if I may answer
10 indirectly, the rationale of Potawatomi in separating
11 regulatory and adjudicatory authority of the State in that
12 case, it was critical that the activities there involved
13 took place on State land -- I'm sorry, on tribal lands.

14 The first ruling of the Court was to the effect
15 that the lands, which were lands which had been purchased
16 and held in trust, were held in trust for the tribe, were
17 in fact tribal lands sufficient to invoke jurisdiction --
18 invoke immunity.

19 When you move then, though, to Mescalero Apache,
20 you go to an activity which is off tribal lands and now
21 you have to look once again at the question whether or not
22 there is tribal sovereign immunity for acts which take
23 place off lands, off tribal lands, and this Court found in
24 Mescalero that there was no immunity for off-reservation
25 commercial activities.

1 QUESTION: But that was in the context of State
2 taxation, wasn't it?

3 MR. PATTERSON: And -- that is correct.

4 QUESTION: Might not that principle be perfectly
5 sound in the case of State taxation but perhaps be of more
6 limited effect where you're talking about the jurisdiction
7 of a court?

8 MR. PATTERSON: That may very well be of more
9 limited jurisdiction. However, the principles announced
10 in Mescalero would support our position that when the
11 tribe goes off tribal lands it's then subject to
12 nondiscriminatory State law, applied equally to all
13 citizens of the State.

14 The stretch for Manufacturing Technologies is to
15 get from a taxation case, State taxation case to a
16 commercial activity off tribal lands, and we feel that you
17 can make that -- we feel that you can rule that the tribe
18 does not have immunity in an off-tribal-land commercial
19 activity because of the general principle enunciated in
20 Mescalero Apache.

21 QUESTION: Is it your view, too -- you also have
22 asserted what I call an all-or-nothing position that once
23 the tribe -- there are a lot of different kinds of laws.
24 There are State discrimination laws. There are State
25 environmental laws. There are State property tax laws.

1 There are State tort laws. There are State contract laws.

2 Is it your view that once the tribe goes off the
3 reservation, the State, or a private person, where
4 appropriate, could bring a lawsuit in a State court
5 against the tribe and there's no assertion of sovereign
6 immunity possible for all those things, or for some?

7 MR. PATTERSON: That -- no -- that would be
8 correct. To run down the line, when the tribe goes off
9 tribal lands, then in the language of, I think Nevada v.
10 Hall, it implicates the jurisdiction of the State of
11 Oklahoma, but this can be true in any one of the 50
12 States. There's no limitation on Kiowa tribal activities
13 in Oklahoma. They may be activities conducted in
14 Honolulu, Hawaii.

15 Commercial laws of the State where the State
16 interest in Potawatomi was limited in a nontribal land
17 situation, the State interest is much greater in an off-
18 reservation situation, so you have nondiscriminatory State
19 laws regarding contract, commercial, occupational,
20 licensing -- the whole gamut of possible State regulation,
21 and the tribe would be subject to that.

22 QUESTION: So the -- you and the Solicitor
23 General agree that either you can bring a lawsuit against
24 the tribe acting off-reservation under all these laws or
25 under none of them, and you say you can bring the suit

1 irrespective, and they say none. You say all, they say
2 none. Is -- am I right? Is that what you --

3 MR. PATTERSON: That is right, once again, as
4 modified by the language in Mescalero, absent Federal law
5 to the contrary.

6 QUESTION: And of course the debate between the
7 majority and the dissent in Mescalero was whether there
8 was Federal law to the contrary in that case, because the
9 dissenters claimed that they were -- the tribe was a
10 Federal instrumentality, in effect.

11 MR. PATTERSON: The -- and -- I believe that I'm
12 correct when I say that the -- they -- the rule of
13 Mescalero is based on a finding that there was no tribal
14 sovereign immunity for the off-reservation activity. That
15 was the foundation for that rule.

16 QUESTION: In Potawatomi -- you're more
17 familiar -- I looked at it quickly, but -- or is there
18 some other precedent that makes clear that in the
19 noncontract context, say the State regulatory law context,
20 or the State tax context, that the State or a city or some
21 private person can maintain a lawsuit and collect money
22 from the tribe, or didn't Potawatomi leave that open?

23 MR. PATTERSON: Well, once again, in
24 respondent's view, Potawatomi announced the rule for on-
25 reservation activity.

1 QUESTION: Yes.

2 MR. PATTERSON: Our position is that that rule
3 doesn't travel off the reservation.

4 QUESTION: So that -- but you -- there is no
5 authority, I take it, either way in respect to any of
6 these laws for tribe activity, in respect to any of these
7 laws off the reservation, any category, which makes clear
8 that the State or a city or a private person can sue the
9 tribe, or that makes clear it can't sue the tribe.

10 MR. PATTERSON: Justice --

11 QUESTION: There is no clear authority either
12 way on that, I take it. Is that right?

13 MR. PATTERSON: Justice Breyer, I find none. We
14 believe that this is a case of first impression. However,
15 Mescalero once again stands for the proposition that the
16 State -- I'm sorry, the Federal Government does not have
17 exclusive jurisdiction over the tribe.

18 There are a number of cases arising in tribal
19 taxing situations, mostly, to the effect that the States
20 do have authority over certain aspects of activities on
21 tribal lands. The Potawatomi case separated the
22 regulatory from the adjudicatory authority, and it wasn't
23 the first case. I think Colville perhaps did the same
24 thing, and in Colville the Court said that the State of
25 Washington could seize cigarettes before they ever got to

1 the reservation, and thereby satisfy its claims.

2 United States v. Strate was a case which I
3 believe remarried the adjudicatory and regulatory
4 authority of a State on certain activities on tribal
5 lands, but it's really not to the point that we're talking
6 about today.

7 Our point is that we have one rule for
8 Potawatomi, for on-reservation activity. Off-reservation
9 activity is a whole different matter.

10 QUESTION: What is -- but I'm beginning to -- I
11 hadn't seen fully the implications for tax law, regulatory
12 law, all kinds of other laws, and if there are -- I'm not
13 certain they've been fully argued out, because you've been
14 focusing on contract.

15 Does it make sense, then, to say the State was
16 wrong in going on State law and then permit this thing to
17 be argued more fully where all these implications are
18 explored?

19 MR. PATTERSON: If I -- if I understand you, you
20 ask is this a State law question to be --

21 QUESTION: No, I'm thinking -- I think perhaps
22 the lower court said it was State law, and perhaps it's
23 wrong on that.

24 MR. PATTERSON: I --

25 QUESTION: If it's wrong on that, I wonder if we

1 shouldn't send it back. I -- that's -- rather than try to
2 go into this very broad question, well beyond contract law
3 that's at stake here.

4 MR. PATTERSON: In my view this is not a State
5 law question. We're talking about Federal statutes,
6 treaties, the Constitution -- these are Federal questions.

7 QUESTION: Well, isn't it correct to say that
8 it's both a Federal law question and a State law question,
9 because if there is a Federal law that says the tribe's
10 immune here, that would obviously control.

11 If there's no Federal law, a State still could,
12 as a matter of comity, recognize the immunity of the
13 tribe, just as in Nevada v. Hall it could have been
14 decided the other way as a matter of State law.

15 So you've got -- it seems to me inevitably you
16 have both a Federal issue and a State law issue, and the
17 State law issue has been decided. They're not going to
18 show comity here, and they've assumed the answer to the
19 Federal question, and -- which we have to really resolve.

20 MR. PATTERSON: I would agree that -- I think
21 the principal issues are Federal law principles, but once
22 you find that a State has certain rights, then you do get
23 into the State law aspect of the question, and this Court
24 has dealt with that in a number of cases on-reservation,
25 arising out of State regulatory actions.

1 position The -- I think that Puyallup was mentioned a
2 moment ago. Puyallup had to do with fishing rights on-
3 reservation. To that degree, we feel that it's not
4 controlling in our situation. This situation relates to
5 the activities of the tribe when it goes beyond its
6 boundaries.

7 Nevada, in reciting some of the rule says,
8 Number 1, a sovereign cannot be sued in its own courts
9 without its consent. That is the rule. Whatever rights
10 the visiting sovereign, the sovereign that comes into the
11 property, into the jurisdiction of the first sovereign,
12 the host sovereign has, are there merely as a matter of
13 comity. They're not accorded any rights as a matter of
14 their own independent sovereignty, because they're now in
15 some other sovereign's jurisdiction.
16 What the tribe seeks, what the United States
17 wants to give them in this case is a sovereignty which
18 says that when the tribe goes into another court's
19 jurisdiction -- the State of Oklahoma, the State of
20 Hawaii, the State of whatever, that at that point the
21 tribe's sovereignty supersedes that of the jurisdiction of
22 the State of Oklahoma, and the State of Oklahoma has no
23 ability to sue it or to control that activity.

24 QUESTION: Until Congress says otherwise.

25 I thought the United States was taking the

1 position that it's the peculiar relationship of trust
2 between the United States and the tribes that gives them
3 this kind of unusual dependent sovereignty, not really the
4 kind of sovereign -- sovereignty that a sister State or a
5 foreign nation would have, but a dependent, depending on
6 the United States.

7 MR. PATTERSON: That is correct, Justice
8 Ginsburg. The basis for Indian law, Indian sovereignty,
9 certainly has to do with the relationship between the
10 tribe and the U.S. Government.

11 In this case, however, in our opinion the U.S.
12 tries to go outside of Federal common law and other law as
13 we know it and give the tribe immunity when it takes
14 whatever acts in a commercial vein in this situation
15 outside its own reservation, outside the area where it has
16 territorial sovereign immunity.

17 Sovereign immunity always has a territorial
18 aspect, and that's what we ask in this case, is that
19 territorial aspect be respected and accorded the
20 appropriate proper weight.

21 Any further questions?

22 QUESTION: Thank you, Mr. Paterson.

23 Mr. Wallace, you have a minute remaining.

24 REBUTTAL ARGUMENT OF R. BROWN WALLACE

25 ON BEHALF OF THE PETITIONER

1 MR. WALLACE: The Puyallup Three case involved a
2 situation where tribal immunity protected a tribe from
3 suit by the State to regulate off-reservation fishing.
4 The fishing was both on and off the reservation. The
5 tribe was protected by this Court from State suit.

6 The Citizen Band case, with respect to its
7 handling of tribal immunity, did not turn on geography.
8 Instead, the Court went directly to the concept that there
9 had been a long recognition of the inherent immunity of
10 the tribe. Congress --

11 CHIEF JUSTICE REHNQUIST: Thank you,
12 Mr. Wallace.

13 The case is submitted.

14 (Whereupon, at 1:58 p.m., the case in the above-
15 entitled matter was submitted.)
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

KIOWA TRIBE OF OKLAHOMA, Petitioner v. MANUFACTURING TECHNOLOGIES, INC.

CASE NO: 96-1037

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna M. Fedirko

(REPORTER)